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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

ELIZABETH MORGAN,

Petitioner,

vs **No. 607**

MILTON C. POTTER, Superintendent of Milwaukee Public Schools of the City of Milwaukee,

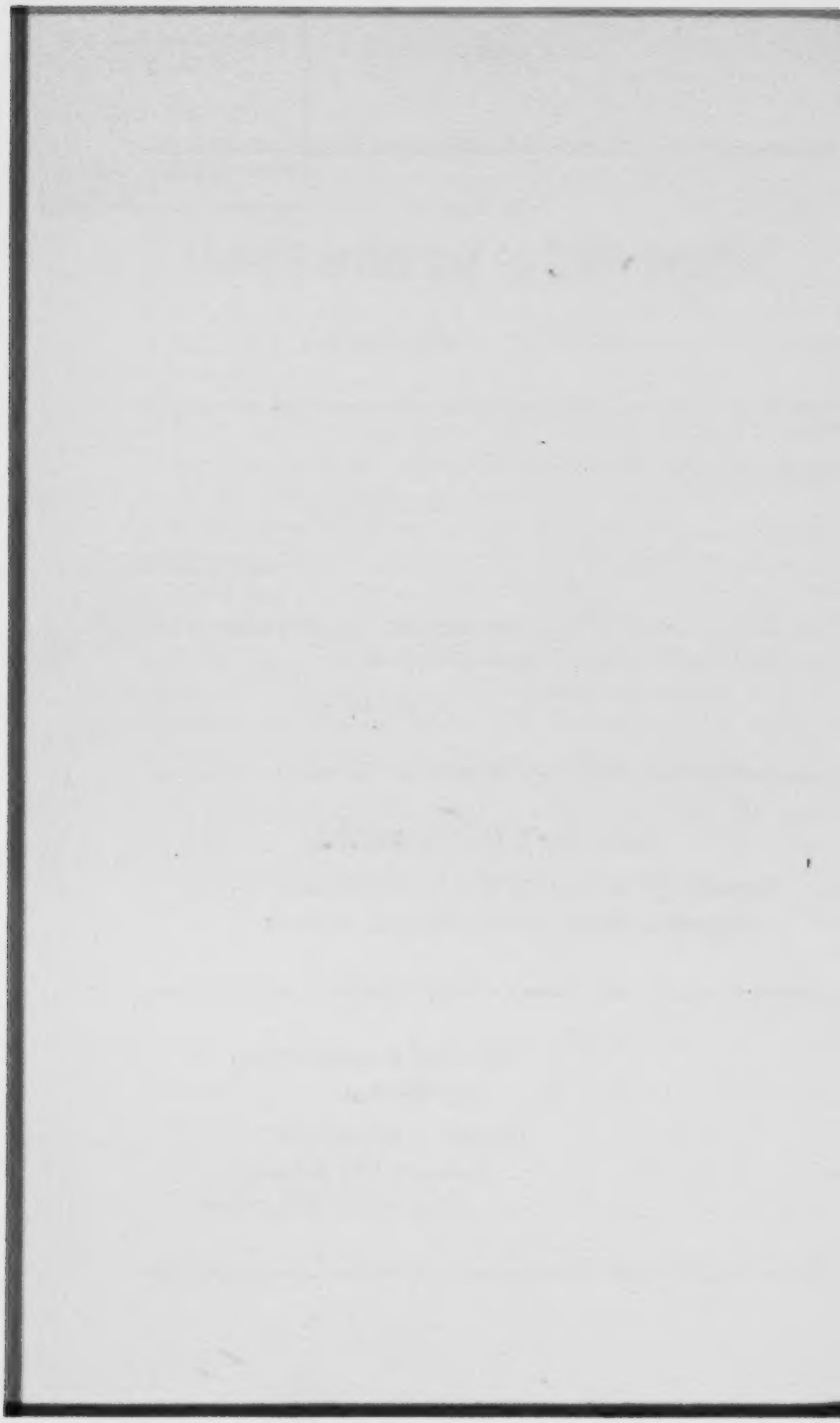
Respondent.

RESPONDENT'S BRIEF

Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

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RESPONDENT'S BRIEF

Opposing Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

The decision and judgment are officially reported in *Elizabeth Morgan vs. Milton C. Potter,* 298 N. W. 763 (decided June 12, 1941) (R. 105).

STATEMENT OF THE CASE.

Petitioner was a teacher in the Milwaukee Public schools from September, 1889 to June, 1939, became 70 years old October 5, 1938 and was retired by the board of school di-

rectors of the city of Milwaukee in June, 1939, the end of the 1938-1939 school year, during which she attained the age of 70, and commenced mandamus action for reinstatement in her teaching position (R. 105). The trial court entered judgment dismissing her petition, quashing the alternative writ and denying the peremptory writ (R. 60). The supreme court of the State of Wisconsin, the highest court in the state, affirmed the trial court judgment upon the grounds set forth in the written opinion (R. 105-110).

In 1909 petitioner became a member of the Milwaukee Public School Teachers' Annuity and Retirement Fund, administered by a board of trustees, created and maintained by the provisions of old section 925xx of the Wisconsin Statutes, renumbered years ago and now constituting Section 42.55. Old subsection (17) of Section 925xx, the tenure provision, is now subsection (18) of Section 42.55 of the Statutes and is set forth on pages 3 and 4 of the petition herein, the only change since the original enactment of the statute having been to reduce the required years of probation teaching before attaining permanent tenure from four to three. Petitioner became entitled to a $500.00 annual pension after the termination of her services (R. 54, 106).

She was retired by the school board pursuant to the provisions of Section 42.55 (12) (k) of the Wisconsin Statutes of 1939, enacted by chapter 160 of the Laws of Wisconsin for 1937, set forth on page 4 of the petition.

In the state courts petitioner asserted that Section 42.55 (12) (k) was invalid as impairing the obligations of her alleged indefinite lifetime teaching contract under Section 42.55 (18), in violation of the constitutional privileges, Article I, Section 12, Wisconsin Constitution, and Article I, Section 10, United States Constitution (R. 108).

QUESTION PRESENTED.

Whether the Wisconsin tenure statute, Section 42.55 (18) of the 1939 Statutes (formerly Section 925xx (17)) granted to petitioner a statutory contract during efficiency and good behavior for life, which could not be impaired by the enactment of Section 42.55 (12) (k) providing for the compulsory retirement of teachers at the age of 70 years, that is, whether the 1937 compulsory seventy year retirement statute violates any right of petitioner under Article I, Section 10, of the United States Constitution.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The petition assigns the following reasons:

1. That the Wisconsin Supreme Court decided the federal question involved in a manner in conflict with the applicable decisions of this court.

2. That petitioner under Wisconsin law had a lifetime contract which the legislature could not terminate at the age of seventy and the Wisconsin Supreme Court decision constitutes an impairment of such alleged contract.

In effect the petitioner in her brief urges that her case is controlled by the decision of this court in *Indiana ex rel Anderson vs. Brand,* 303 U. S. 95, 58 S. Ct. 443, 82 L. Ed. 685, and not by the decisions of this court in *Dodge vs. Board of Education,* 302 U. S. 74, 58 S. Ct. 98, 82 L. Ed. 57 (involving the Illinois statute retiring Chicago tenure teachers at sixty-five) and *Phelps vs. Board of Education, etc.,* 300 U. S. 319, 57 S. Ct. 483, 81 L. Ed. 674, (involving the right of a school board under the New Jersey tenure statute to de-

crease teachers' salaries as against the teachers' claim they had a contract that prohibited reduction).

Argument in Opposition to Petition for Certiorari.

I.

Petitioner had no lifetime contract with the City of Milwaukee or its School Board.

The undisputed facts are that petitioner had never in 1889 or thereafter executed a written contract with the City of Milwaukee or its board of school directors, and no Milwaukee teachers had signed teaching contracts since 1908 (R 73, 78). Petitioner at the trial conceded no such contract had been signed (R. 66).

There was no mutuality of contract insofar as the teaching period was concerned. Miss Morgan, after having obtained permanent employment or indefinite tenure, was free to quit voluntarily any time she pleased. The school board could not compel her to continue teaching if she wished to retire at any time during her fifty years of services. The city could not recover damages for any alleged breach of contract by reason of her having refused any demand of the city that she continue teaching (R. 109). Contracts pursuant to statutory provisions are not favored. They are not implied. One must establish any such statutory contract clearly and unmistakably. Whoever asserts a legislative contract has the burden of establishing it. The relationship between Milwaukee teachers and the city, represented by its school board, under the tenure statute, is that of "legislative status," indefinite as to duration, but

always subject to legislative modification or repeal, as a declaration of state public policy. The grant of indefinite tenure under section 42.55 (18) was a legislative gratuity, petitioner not having paid any consideration for such grant (R. 108-109). The essential elements of a contract are absent.

Morgan vs. Potter, supra;
Morrison vs. Board of Education, 297 N. W. 383 (Wis. 1941);
Taylor vs. Board of Education of San Diego, 89 P. (2d) 148 (Cal. 1939);
Campbell, et al. vs. Aldrich, et al., (3 cases) 79 P. (2d) 257 (Oregon 1938).

II.

The Case is not ruled by Indiana ex rel Anderson vs. Brand.

The decision of *Indiana ex rel Anderson vs. Brand, supra,* is inapplicable and distinguishable from the case at bar and merely holds that the Indiana legislature had granted a contract to the Indiana teachers, which was within the protection of the provisions of the Federal Constitution forbidding impairment of contracts by state action; that the Indiana legislature had the power to adopt a policy of teacher contracts if it saw fit to do so; that there was no doubt about the existence of the Indiana teaching contracts; that the relatrix, Miss Anderson, having become a permanent teacher, under the teachers' tenure law, had a vested property right in her indefinite lifetime contract which could not be impaired by repeal of the statute; that the Indiana statute was not a mere declaration of public policy, subject to modification or repeal by successor legislatures. The 1899 Indiana Act required written contracts

to be executed between teachers and the local school corporations. The 1921 statute amplified the requirements in respect to teaching contract provisions and the 1927 legislature adopted the teachers' tenure act in question. The 1927 tenure statute provided that the then existing teacher contracts, upon the expiration of the stated terms, should be deemed to continue in effect for an indefinite period; should be known as indefinite contracts and should remain in force unless succeeded by new contracts or cancelled for cause as provided in the tenure act. A teacher could not cancel a contract during the school term nor for a period of 30 days previous to the beginning of any term (unless by mutual agreement) and the teacher could cancel only upon 5 days' notice. The 1933 amending act attempted to take township school corporations out of the 1927 tenure act, which the Indiana Supreme Court construed as repealing the 1927 tenure act in townships and leaving the township school authorities free to terminate the employment of teachers. The title of the Indiana Act was couched in terms of contract. It speaks of the making and cancelling of indefinite contracts. In the body of the act the word, "contract," appears 25 times. This court in its opinion says further that the tenor of the act indicates that the word "contract" was not used inadvertently or in any other than its usual and legal meaning and then distinguishes the Indiana case from *Phelps vs. Board of Education* and *Dodge vs. Board of Education, supra.*

III.

This Case is ruled by Phelps vs. Board of Education and Dodge vs. Board of Education.

Section 42.55 (18), the Wisconsin tenure provision is wholly silent as to the word "contract." So are old Section 925xx (17) and Section 42.55 (12) (k). The word "contract" does not appear at all in these tenure provisions. These provisions indicate no intention upon the part of the Wisconsin legislature to grant or establish an indefinite lifetime contract. All Milwaukee teachers, including petitioner, since 1909, the date of the enactment of the tenure statute, knew, or were charged with the knowledge, that the legislature might from time to time enact amendments, including such as Section 42.55 (12) (k).

There was nothing arbitrary or unreasonable about the 1937 compulsory retirement at seventy provision. The legislature well knew that the average teachers commenced to teach at the age of about twenty-four and would have about forty-six years of teaching before compulsory retirement. The length of service and time of retirement are matters of public policy in the educational field, wholly within the domain and plenary powers of the legislature for determination in the interests of the public welfare.

Section 42.55 (18), properly construed, is an inhibition on the school board to dismiss teachers arbitrarily without cause, and never was intended to grant indefinite lifetime contracts. On the other hand, Section 42.55 (12) (k) was a command by the legislature upon the school authorities to retire teachers at 70.

The Wisconsin statute is similar in content and purport to the Illinois statute before this court in *Dodge vs. Board of Education, supra,* and the New Jersey statute before this court in *Phelps vs. Board of Education, supra;* and to that of California before the California courts in *Taylor vs. Board of Education of San Diego, supra;* and is very similar to the Oregon statute before the Oregon courts in *Campbell vs. Aldrich, et al., supra,* which refers to "permanently employed" teachers, as does Section 42.55 (18) of the Wisconsin Statutes. We respectfully submit that the *Phelps* and *Dodge* cases rule the case at bar adversely to the petitioner herein.

It was conceded by respondent in the trial and on appeal below that petitioner had an "annuity contract" which entitled her to an annual pension after retirement by reason of her having paid the monthly amounts prescribed by the annuity provisions of the statute, but the annuity provisions of Section 42.55 as a whole are separable from and independent of the retirement provision, Subsection (18) (R. 108), there being no contract in respect to a period of indefinite or lifetime service, but only in respect to the annual annuity or pension, as held by our Wisconsin Supreme Court in its opinions in the instant case and in *Morrison vs. Board of Education, supra.* Miss Morgan had a vested right in her annuity or pension, but no vested right to such indefinite or lifetime employment either before or after the adoption of Section 42.55 (12) (k) in 1937 (R. 106).

IV.

Petitioner erroneously relies on earlier Wisconsin decisions as holding she had a vested contract.

Petitioner erroneously relies on *State ex rel. Dudgeon vs. Levitan,* 181 Wis. 326, 193 N. W. 499 (1923); *State ex*

rel Mellen vs. Teachers' Annuity and Retirement Fund Trustees, 185 Wis. 653, 201 N. W. 383 (1924); *State ex rel O'Neil vs. Blied,* 188 Wis. 442, 206 N. W. 213 (1925); *State ex rel Nyberg vs. School Directors,* 190 Wis. 570, 209 N. W. 683 (1926); and *State ex rel Karnes vs. Board of Regents,* 222 Wis. 542, 269 N. W. 284 (1936). All these cases were considered by the Wisconsin Supreme Court on the appeal. They all antedate the adoption of Section 42.55 (12) (k) in 1937.

In *Morgan vs. Potter,* 298 N. W. 763, the case at bar, the Wisconsin Supreme Court grounded its decision on the cases of *Dodge vs. Board of Education, supra,* and *Morrison vs. Board of Education, supra,* decided April 15, 1941 (R. 108-109).

In the *Morrison* case at pages 386-7 the Wisconsin Supreme Court states in reference to the *Nyberg* case, the *O'Neil* case, and by implication the *Dudgeon* case:

> "Insofar as the opinion intimates that the legislature could not have changed the permanent employment features of this retirement act, it goes further than is necessary for its holding. Obviously, if the statute confers permanent tenure, a school board cannot destroy the tenure whether a subsequent amending statute can do so or not. That is all that was involved in the case, and hence we are not disposed to consider whether the dictum is correct as applied to the statute there involved."

In the *Karnes* case the Wisconsin Supreme Court merely held that under the tenure statute applicable to Wisconsin Normal School teachers, the Board of Normal Regents could not assign a teacher with permanent tenure to a certain named position in which his principal occupation

was that of teaching, and then effect his discharge *by subsequent action abolishing the position although continuing the work;* in effect that a teacher could be dismissed for cause only and not by subterfuge.

In the *Mellen* case the Wisconsin Supreme Court merely held that plaintiff by taking a leave of absence for about a year in 1920 and resigning as of September 1, 1921 did not separate herself from the service so as to disqualify her from being entitled to a pension which the defendant trustees had denied her. She was not suing for reinstatement, but for the annuity. The court, we believe, used the word "contract" in its opinion inadvisably, but the contract in issue there was the annuity contract and not the teaching contract.

The opinions in the *Morgan* and *Morrison* cases are the last words of the Wisconsin Supreme Court on the question of the non-existence of a contract that the legislature could not diminish. Being such last decisions, they expressly or impliedly overruled the prior *Dudgeon, O'Neil, Nyberg, Karnes* and *Mellen* cases, insofar as those cases held or intimated that a teacher had a lifetime contract beyond the reach of the legislature either under Section 42.55 (18), applicable only to teachers in cities of the first class (Milwaukee), or similar statutes applicable to teachers in the schools elsewhere in the state or in the State University or Normal Schools. Section 42.55 (18) does not constitute an indefinite lifetime contract between the Milwaukee teachers and the City of Milwaukee or its school board, but is a mere declaration of public policy which could validly be changed by the enactment of Section 42.55 (12) (k), as held in the *Morgan* and *Morrison* cases (R. 109).

It being clear that Miss Morgan had no enforcible lifetime contract, as claimed by her to exist under the Wiscon-

sin Statute in question, and our Wisconsin Supreme Court having held no contract exists, Section 42.55 (12) (k) providing for compulsory retirement at seventy, does not violate Article I, Section 10, of the United States Constitution.

CONCLUSION.

It is respectfully submitted that the case of *State of Indiana ex rel Anderson vs. Brand* is clearly inapplicable and distinguishable from the case at bar; that it does not rule the case at bar; that the case at bar is ruled on the federal constitutional question adversely to the petitioner by *Dodge vs. Board of Education* and *Phelps vs. Board of Education;* that the Wisconsin Supreme Court decision and judgment in *Morgan vs. Potter* is not in conflict with the law applicable as declared in the *Dodge* and *Phelps* cases, and that the writ of certiorari herein should be denied under the decisions and rules of this court.

Respectfully submitted,

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